Supreme Court, U. S.
FILED
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APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-966

AMERICAN FOREIGN STEAMSHIP COMPANY,
a corporation, *Petitioner*,

vs.

LILLIAN M. MATISE, as personal representative of
Granville C. Matise, deceased, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed February 4, 1975
Certiorari Granted March 17, 1975

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 13, 1970—Plaintiff's Complaint for Unpaid Wages and Penalty filed in U.S. District Court for the Northern District of California.

May 6, 1970—Defendant American Foreign Steamship Co.'s Answer filed in U.S. District Court for the Northern District of California.

January 5, 1971—Plaintiff's Notice of Motion and Motion for Summary Judgment filed in the U.S. District Court for the Northern District of California.

March 30, 1971—Defendant's Notice of Cross-Motion and Motion for Summary Judgment filed in the U.S. District Court for the Northern District of California.

September 8, 1971—Order entered denying plaintiff's Motion for Summary Judgment and denying defendant's Cross-Motion for Summary Judgment.

November 9, 1971—Pre-trial Order filed in the U.S. District Court for the Northern District of California.

December 10, 1971—Judgment entered in favor of defendant following Court trial.

January 3, 1972—Plaintiff's Notice of Appeal filed.

March 8, 1974—Opinion and Judgment of the U.S. Court of Appeals for the Ninth Circuit filed.

April 4, 1974—Order of the U.S. Court of Appeals for the Ninth Circuit amending its Opinion and denying defendant's Petition for Rehearing.

April 22, 1974—Plaintiff's Motion to Enter Judgment filed in the U.S. District Court for the Northern District of California.

May 13, 1974—Defendant's Memorandum in Opposition to plaintiff's Motion filed in the U.S. District Court for the Northern District of California.

May 20, 1974—Plaintiff's Reply Memorandum in Support of Motion to Enter Judgment filed in the U.S. District Court for the Northern District of California.

June 13, 1974—Judgment Entered by U.S. District Court for the Northern District of California awarding plaintiff $510.00 as wages wrongfully withheld, $29,462.00 as penalty wages, together with interest and costs thereon.

July 15, 1974—Defendant's Notice of Appeal filed.

August 30, 1974—Plaintiff's Application for Order Expediting Decision on Appeal filed in U.S. Court of Appeals for the Ninth Circuit.

September 11, 1974—Defendant's Opposition to plaintiff's Motion to Expedite Decision on Appeal filed in the U.S. Court of Appeals for the Ninth Circuit.

September 27, 1974—Order entered by the U.S. Court of Appeals for the Ninth Circuit dismissing defendant's Appeal.

October 11, 1974—Defendant's Petition for Rehearing en banc filed in the U.S. Court of Appeals for the Ninth Circuit.

November 7, 1974—Order entered by the U.S. Court of Appeals for the Ninth Circuit denying Petition for Rehearing and rejecting suggestion for a Rehearing en banc.

AMERICAN FOREIGN STEAMSHIP CORPORATION

J. H. Winchester
351 Calif. St., Rm. 520
Tel: 781-0918

80 Broad Street, New York, N. Y. 10004

PAY VOUCHER

Voucher No. ____ of ____

S.S. AMERICAN HAWK Voy. No. 26 Port of SAIGON Date 3/19/69

Name GRANVILLE C. MATISE Rating OILER W4 Status 4 Soc. Sec. No. 464 18 7559

WAGES								
From	1/11/69	to	3/19/69	2 mos.	9 days @ $ 443.71	per mo.	$1020.53	1020.53
From	____	to	____	____ mos.	____ days @ $ ____	per mo.	____	
From	____	to	____	____ mos.	____ days @ $ ____	per mo.	____	$ ____
AREA BONUS								
From	2/ 7/69	to	2/16/69		10 days @	$14.79 per day	$ 147.90	147.90
EXPLOSIVE AND OTHER BONUSES								
From	3/13/69	to	3/19/69	____ mos.	7 days @	14.79 per mo.	$ 103.53	103.53
OVERTIME								
206 hours @		2.80	per hour				576.80	576.80
____ hours @		____	per hour					

TOTAL EARNED SUBJECT TO INCOME TAXES $1848.76

FOR F.I.C.A. TAX PURPOSES ONLY

TOTAL EARNED ____ $1848.76

ADD

Board and Lodging 60 days @ $1.28 per day ____ 81.60

Subsistence and Lodging Ashore ____ days @ $____ per day ____

TOTAL SUBJECT TO F.I.C.A. TAX $ 1930.36

ADD Subsistence Ashore—From ____ to ____ days @ $ ____ per day $____

Lodging Ashore—From ____ to ____ days @ $ ____ per day $____

Transportation, Etc. ____ $____

TOTAL AMOUNT DUE $1848.76

N.R.A. TAX COMPILATION—Citizen/Subject of ____

Total Earned For Voy. $____ Per cent of Voy. in U.S.A. ____ %____

Amount Earned for ____ days in U.S. Territorial Waters ____ $____

Less—Exemption Full Voyage of ____ days @ $____ per day $____

AMOUNT SUBJECT TO TAXES $____

DEDUCTIONS TRANSPORTATION SAIGON TO SAN FRANCISCO	510.00	
Advances	$ 334.12	
Slop Chest	51.01	
Allotments	400.00	
Fines	114.73	
Withholding Tax For 68 days on $1848.76 (Per Official Wage Bracket Table)	227.80	
F.I.C.A. Tax 4.8% of $1930.36	92.65	
TOTAL DEDUCTIONS		$1730.31
BALANCE DUE		$ 118.45

Extensions and Additions checked

By ____

I certify that this pay voucher is true and correct; that the person named hereon was employed and has performed the services for the period stated above; and that the person whose name appears on this pay voucher is entitled to the amount of pay stated for him.

W. H. ROYAL
Master (or other authorized representative)

Received Payment in Full for all Services Stated Above

AMERICAN HAWK

G. C. MATISE
Employee's Signature
CK A-1983 JHW-SF
3/24/69 — a/c 600 AJH

Treasury Department
U. S. Coast Guard
CG-718A (Rev. 6-52)

MUTUAL RELEASE

Official number of vessel 243969

To: COMMANDANT (MVP-1) (Original)

We, the undersigned, seamen on board the SS AMERICAN HAWK on her late voyage from LONG BEACH CALIFORNIA to FOREIGN for which articles were opened at LONG BEACH CALIFORNIA on 11 JANUARY, 1969, do hereby, each one for himself, by our signatures herewith given, in consideration of settlements made before the Shipping Commissioner at this port, release the master and owners of said vessel from all claims for wages in respect of the said past voyage or engagement, and I, master of said vessel, do also release each of the seamen signing said release from all claims, in consideration of this release signed by them.

Dated 24 MARCH, 1969

Port of SAN FRANCISCO, CALIF.

W. H. Royal (Absent)
Master.

ATTEST as to said master and the One (1) seamen whose signatures appear below.

/s/
Shipping Commissioner.

Social Security No.	EG-739 issued Seaman's Signature	Continuous Discharge Book or Certificate of Identification No.	Rating	Date Wages Commenced 1969	Date of This Settlement 1969	Wages per Month	Total Wages Earned	Total Deductions	Amount Cash Received on This Settlement
464-18-7559	Granville C. Matise	Z-1064629-D2	Oiler	1/11	3/19	443.71	1843.76	1730.31	118.45

REPORTED LEFT VESSEL AT SAIGON SOUTH VIET NAM 3-19-69 FIRED ARTICLES REMAIN OPEN

Sighted Certificate of Discharge No. I 6338532 Dated 3-19-69 issued by U.S. Vice Consul at Saigon South Viet Nam.

The United States District Court
Northern District Of California

Before: Hon. Robert H. Schnacke, Judge

No. C-70 538 RHS

Granville C. Matise, Plaintiff,
vs.
American Foreign Steamship Corporation, et al., Defendants.

REPORTER'S PARTIAL TRANSCRIPT

December 10, 1971

Appearances:
For Plaintiff:
Eric J. Schmidt, Esquire
220 Bush Street
San Francisco 94104
For Defendants:
Graham & James
Attorneys at Law
By: John A. Flynn, Esquire
310 Sansome Street
San Francisco 94104

December 10, 1971

THE COURT: All right, gentlemen. I thank you for your argument.

None of the cases cited by the plaintiff seem to be precisely the case that we have here, and none of them caused me to change my view on the state of the law.

It is perfectly plain that in any disputed matter, as between the shipowner or the master of the ship and the seaman, the master clearly may not resolve the dispute in his own favor by taking a deduction that is in any way subject to review or consideration. But that doesn't mean that a seaman is totally incapable of directing the application of his own funds, and from the evidence that's before me I must find that that is what happened in this case: that the seaman here, who was at all times significant herein, a member of the vessel AMERICAN HAWK, was a citizen of the United States, signed on at Long Beach January 10, 1969, and who was discharged for willful misconduct and neglect of duty in Saigon on March 19, 1969, was properly discharged for good and lawful cause.

From the evidence it's undisputed that the obligation to repatriate the plaintiff was not upon the shipowner, but was rather the personal responsibility of the seaman.

By reason of regulations of the Army and the government of South Vietnam at the time of the discharge, it was impossible to permit the transfer of money to the seaman to permit him to go ashore to buy his own ticket. The currency regulations of South Vietnam had required the sealing of the safe of the AMERICAN HAWK; and under the circumstances in Saigon at the time, airline tickets could be purchased only with United States currency.

The plaintiff consented to and approved the purchase of an airline ticket for his purposes with his money under circumstances that were arranged by the master and the vice consul with the special permission of the South Vietnamese customs officials. The purchase of that ticket under those circumstances constituted the equivalent of payment of monies over to the seaman.

The release that he later signed in signing off the articles and in accepting the pay voucher and in the later release, which is Exhibit G, don't constitute a waiver of claim in any fashion, and they weren't received in evidence for that purpose, but they do indicate that this was not and never has been a disputed item in any way. They are evidence of the consent and approval of the plaintiff of the payment to him in this fashion. Accordingly, his having been paid everything that he was entitled to be paid obviously precludes his being successful in an action of this sort.

So it is the conclusion of the Court that this Court has jurisdiction under the General Maritime Law; the plaintiff was lawfully and properly discharged for cause by reason of his own willful misconduct and neglect of duty; that there was no unlawful withholding by the defendant of the sum of $510.00 or any other amount; and that since there was no unlawful withholding or illegal deduction from plaintiff's earned wages, there are no grounds for recovery of the double-wage penalty.

Accordingly, the defendant is entitled to judgment in this action with costs.

The transcription of my remarks here will constitute the Court's findings of fact and conclusions of law for all purposes of the case.

United States Court of Appeals
Ninth Circuit

No. 72-1345

Lillian M. Matise, as personal representative of Granville C. Matise, Deceased, Appellant

vs.

American Foreign Steamship Co., Appellee

March 8, 1974
As Amended on Denial of Rehearing
April 4, 1974

Before MERRILL and ELY, Circuit Judges, and EAST,* District Judge.

OPINION

ELY, Circuit Judge:

This appeal arises from a suit brought by Granville C. Matise,[1] a seaman, against American Foreign Steamship Corporation, in which Matise alleged that $510.00 of his earned wages had been unlawfully withheld from him. He sought the recovery of these wages and claimed the double wage penalty allowed to seaman for wages

*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

[1]Matise died during the pendency of his suit. The State of Maryland appointed Lillian M. Matise as his Personal Representative, and, pursuant to stipulation, the District Court substituted her as the plaintiff in the action.

withheld without sufficient cause.[2] The District Court, in a trial without jury, found that there was no unlawful withholding and entered judgment for the shipowner. We reverse.

Briefly, the facts of the case are these: Matise signed articles of employment as an oiler for a foreign voyage aboard the S.S. American Hawk, appellee's vessel, on January 11, 1969 in Long Beach, California. He was discharged for good cause on March 19, 1969 in Saigon, South Vietnam, in the presence of the ship's captain, the United States Vice Consul, and two United States Coast Guard officials. The captain was advised by the Vice Consul and Coast Guard officials that the shipowner did not have a duty to pay the cost of transportation to repatriate Matise, since his discharge was for good cause. These officials were not acting within their official authority in so advising the ship's captain. The shipowner was obliged by treaty and by the laws of the government of South Vietnam to remove all persons brought to South Vietnam by the ship. At that time, however, South Vietnam prohibited American seamen from carrying United States currency ashore and required that the ship's safe containing currency be sealed. Thus, Matise

[2]46 U.S.C. § 596 reads, in pertinent part:

"The master or owner of any vessel [making foreign voyages] . . . shall pay to every seaman his wages . . . within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens . . . Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court. . . ."

could not simply be paid the wages that were due him and put ashore. Furthermore, an airline ticket for transportation to the United States from Saigon could only be purchased with United States currency. With the approval of the Vice Consul, the ship's captain was granted permission *by* South Vietnamese Customs to break the seal on the vessel's safe and withdraw the amount necessary to purchase an airline ticket to the United States, $510.00. The ship's captain then purchased, or arranged for his agent to purchase, the ticket, which was given to Matise. In the presence of the Vice Consul, the two Coast Guard officials, and the ship's captain, Matise was given a Wage Voucher signed by the captain in the amount of $118.45. The cost of the airline ticket had been deducted from the full amount of wages due Matise, and $118.45 was the remainder. While there is some dispute as to whether or not the seaman signed the Wage Voucher while in Saigon, the Voucher indicates on its face that it was signed by Matise in San Francisco. After arriving in the United States, Matise was signed off the ship's articles by the U.S. Shipping Commissioner in San Francisco. The Commissioner required Matise to sign a release as a condition to the latter's receiving any part of his wages. Matise took the release and the Wage Voucher as prepared by the captain to the shipowner, which in turn required Matise to sign the Voucher in order to receive any of his wages. On these facts, the District Court found that the $510.00 used to purchase the airline ticket to repatriate Matise was a partial payment of wages and that there was therefore no unlawful withholding.

Here, the questions are: (1) Was there an unlawful withholding of Matise's wages? (2) If so, was the unlawful withholding without sufficient cause?

As a general principle of maritime law, when a seaman is discharged for good cause in a foreign port, the seaman's misconduct, is, in effect, a breach of the seaman's contract with the ship and terminates the shipowner's obligation to bring the seaman home. Norris, The Law of Seamen (3rd Ed.) Vol. 1, Section 420 (1970); Ward v. United States, 66 F.Supp. 237 (D.C. 1946). Furthermore, by statute, the wages of a seaman on a foreign voyage become due and payable within twenty-four hours after the cargo has been discharged or within four days after the seaman has been discharged, whichever first occurs. 46 U.S.C. §596. Failure to pay the seaman within the statutory time limit, without sufficient cause, subjects the shipowner to double wage penalties. 46 U.S.C. §596.

The appellee argues that since maritime common law only requires a shipowner to pay wages to a seaman discharged for cause, the ship's captain effectively paid Matise part of his wages by buying him a ticket home. The appellee's argument cannot stand in view of the far-reaching protection of seaman's wages which is now provided by statute. As the Supreme Court said in Isbrandtsen v. Johnson, 343 U.S. 779, 784, 72 S.Ct. 1011, 1015, 96 L.Ed. 1294 (1952):

"Congressional legislation now touches nearly every phase of a seaman's life . . . . It deals specifically with his shipping articles and the payment to him of his wages . . . . It insures the payment to him of the balance of [his] wages upon completion of his voyage or shortly

after discharge. It deals explicitly with the final payment of wages."

The shipowner in this case did not pay part of Matise's final wages in Saigon, as it argues, since the $510.00 was not paid to Matise but to an airline. Although the appellee contends that the transportation money spent on Matise's alleged behalf is equivalent to the payment of wages to Matise, the applicable statutes explicitly and unequivocally provide that the wages due are to be paid *to the seaman,* 46 U.S.C. §§596-597. Furthermore, the shipowner here was acting to some extent in its own behalf in view of its legal obligation to remove all persons, including a discharged seaman such as Matise, whom it had transported to South Vietnam. Even, however, had the money been spent entirely for the benefit of Matise, it could not be treated as a partial payment of his wages and thereby deducted from the total amount of wages that he had earned and to which he was entitled. In Gonzales v. Isthmian Steamship Co., 1958 A.M.C. 97 (E.D.Pa. 1957), the shipowner paid for a lawyer and incurred related expenses for the benefit of a seaman held in jail on charges of assault. Although the seaman had signed an agreement with the ship allowing the expenditures to be paid as an advance on his wages, the District Court refused to allow the shipowner to deduct the amount of the expenses from the seaman's wages. The Court said: ". . . except as expressly provided by law, a seaman cannot give up any right to wages, or any remedy for the recovery of wages, even by agreement." 1958 A.M.C. at 105. In so writing, the court followed the rule of Isbrandtsen v. Johnson, *supra,* which held that only those specific deductions and set-offs designated by statute

could be withheld from a seaman's wages. In *Isbrandtsen* the Supreme Court held that regardless of the validity of the shipowner's claim against the seaman, the shipowner may not withhold the seaman's wages to satisfy those claims. The Supreme Court wrote:

"Congress has gone so far in expressly listing such deductions and set-offs that it is a fair inference that those not listed may not be made. It thus remains for the courts to determine only what are the deductions or set-offs for derelictions of duty that are listed by Congress, rather than to determine which of the deductions or set-offs once known to the general maritime law Congress has failed to exclude. Congress, in effect, has excluded all of them except those which it has listed affirmatively." 343 U.S. at 789, 72 S.Ct. at 1017.

The statutory scheme enacted by Congress does not provide for set-offs or deductions for return transportation expenses, and *Isbrandtsen* has been applied to bar the deduction of repatriation costs from a seaman's wages. In Schwark v. S.S. Rio Macareo, 249 F.Supp. 375 (E.D. La. 1966), a seaman was discharged for good cause in a foreign port, just as was Matise in our case. An agreement in the articles of the ship provided that the ship was not obligated to pay the cost of repatriating any crewmember discharged for cause. Nevertheless the court held that as a matter of law, the ship could not offset the cost of repatriating the seaman against his wages, even though the court found that the ship had a valid claim against the seaman for that amount. *See also* Swain v. Isthmian Lines, Inc., 360 F.2d 81 (3d Cir. 1966), wherein the shipowner was required to restore wages and pay a double wage penalty for withholding from a sea-

man's wages the cost of medical treatment paid by the ship, a cost for which the seaman was admittedly liable; Keen v. United States, 199 F.2d 151 (2d Cir. 1952), wherein a shipowner who had deducted from a seaman's wages the cost of medical treatments and transportation to the United States was assessed double penalty wages; Shilman v. United States of America Shipping Administration, 164 F.2d 649 (2d Cir. 1947), cert. denied, 333 U.S. 837, 68 S.Ct. 608, 92 L.Ed. 1122 (1948), wherein the Second Circuit held that a seaman discharged in a foreign port is entitled to receive all his earned wages, without any deductions whatsoever except those specifically authorized by statute; Ventiadis v. C. J. Thibodeaux & Co., 295 F.Supp. 135 (S.D.Tex. 1968), wherein it was held that although a seaman had signed a release, left the ship at his own request, and was flown at company expense to his home port in Greece, he was nevertheless entitled to double penalty wages for the repatriation costs deducted from his wages.

The foregoing authorities make it clear that the shipowner, in deducting transportation costs from Matise's wages, unlawfully withheld those wages within the meaning of 46 U.S.C. § 596. Furthermore, the case law has, for at least two decades, provided full notice to shipowners seeking to avoid the imposition of double wage penalties that only those deductions from wages that are allowed by statute are lawful. As the court remarked in Swain v. Isthmian Lines, Inc., *supra:*

"It has been eminently clear in the law, at the very least since the Supreme Court case of Isbrandtsen Co. v. Johnson in 1952 that a deduction from wages for medical expenses such as were incurred by appellee in the instant

case is wrongful as falling outside the proper deductible instances . . . . This question, therefore has been closed for some time." 360 F.2d, at 83 (footnote omitted).

It is therefore clear that the shipowner in our case cannot claim that it had "sufficient cause" to withhold a portion of Matise's wages because of reliance on the general maritime law which did not require a shipowner to pay the cost of repatriating a seaman discharged for good cause. As we have previously indicated, this argument has been without merit since the Supreme Court decided Isbrandtsen v. Johnson, *supra,* over twenty years ago.

The only remaining question is whether the shipowner can avoid double wage penalties because Matise signed the Wage Voucher and mutual release before the shipping commissioner. Where, as here, a seaman has been compelled to sign a release and Wage Voucher in order to receive wages which the shipowner admits are due, the release has been set aside by the courts as having been executed under duress. In Prindes v. S.S. African Pilgrim, 266 F.2d 125 (4th Cir. 1959), a seaman was logged two days' pay for failing to return to his ship one hour before the posted sailing time as his contract required. At the termination of the voyage the seaman was offered his earned wages minus the logged pay, but before he could receive *any payment* he was required by the ship to sign a Wage Voucher and a mutual release. The court, in holding that the Wage Voucher and release were invalid, declared: "It is well settled that a seaman is entitled to double wages or 'waiting time' under 46 U.S.C.A. § 596, if wages concededly due are tendered only upon condition that he will release disputed claims." 266 F.2d at 127. And in Isthmian Lines, Inc. v. Haire, 334 F.2d

521 (5th Cir. 1964), the shipowner contended that the seaman's right to maintenance and cure monies was foreclosed because of a mutual release that the seaman had executed before the shipping commissioner when his earned wages were paid. The Fifth Circuit, in affirming the District Court's judgment in favor of the seaman emphasized:

"The Shipping Commissioner is no roving arbiter of all of the disputes between ship and seaman. He is given no power to resolve unliquidated demands for cure, for maintenance . . . . Moreover, as a principle of ordinary law—land-locked, seagoing, or amphibious—a release for payments for amounts admittedly due lacks consideration." 334 F.2d at 523. *See* 46 U.S.C. § 597, which provides that any court having jurisdiction may on good cause shown set aside a release signed before a shipping commissioner and take such action as justice may require. *See also* Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942), and Pacific Mail S.S. Co. v. Lucas, 258 U.S. 266, 42 S.Ct. 308, 66 L.Ed. 614 (1922).

Matise was misinformed in Saigon by the Vice-Consul, the two Coast Guard officers, and his captain by their representations to him that he could "be forced to spend his own money to send him back home." Furthermore, he was compelled to sign the release and Wage Voucher in order to receive the remainder of his wages that admittedly were due. In these circumstances, we hold that neither the Wage Voucher nor the release can in any manner be treated as a waiver by Matise of his claim or a factor tending to show that the shipowner had "sufficient cause" to withhold a part of Matise's wages.

Reversed.

United States Court of Appeals
Ninth Circuit

No. 72-1345

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Appellant,
vs.
American Foreign Steamship Co.,
Appellee.

[Filed April 4, 1974]

On Petition For Rehearing

ORDER

Before: MERRILL and ELY, Circuit Judges, and EAST, District Judge.*

The court amends its opinion in the subject cause by deleting the last sentence of the first incomplete paragraph on page 3 of the slip opinion dated March 8, 1974. The sentence, now deleted, read: "The District Court further found that even had there been an unlawful withholding, it was not without sufficient cause within the meaning of 46 U.S.C. § 596." The court's opinion having been amended as above specified, the Petition for Rehearing is DENIED.

*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

In The United States District Court
For the Northern District of California

No. C-70 538 RHS

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff,
vs.
American Foreign Steamship Company, et al.,
Defendants.

[Filed June 13, 1974]

JUDGMENT ON MANDATE

Lillian M. Matise, as personal representative of Granville C. Matise, deceased, having appealed to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this cause on the 15th day of December, 1971, and said Court having issued its Mandate dated the 9th day of April, 1974, wherein it was ordered, adjudged and decreed that such judgment be reversed, with costs assessed at $94.65 in favor of appellant:

Now upon the Mandate of the United States Court of Appeals for the Ninth Circuit, dated the 9th day of April, 1974.

It is Ordered, Adjudged and Decreed that the judgment of this Court entered December 15, 1971, be, and the same is hereby vacated and set aside; that the cause be restored to the docket for further proceedings in ac-

cordance with such Mandate; and that, pursuant to said Mandate, judgment be entered that Lillian M. Matise, as personal representative of Granville C. Matise, deceased, have and recover from American Foreign Steamship Corporation the following sums:

1. $510.00 as wages wrongfully withheld, with interest thereon at seven percent (7%) from March 24, 1969 to December 15, 1971, amounting to $95.62, for a total sum of $605.62;

2. $29,462.00 as penalty wages for the wrongful withholding of earned wages from March 24, 1969 to December 15, 1971, with interest thereon at seven percent (7%) from December 15, 1971, to June 7, 1974, amounting to $5,106.00;

3. $94.65 as costs on appeal;

4. $37.00 as costs in this Court.

Dated: June 13, 1974.

Robert H. Schnacke
Judge of the United States District Court

Eric J. Schmidt
528 Mills Tower
220 Bush Street
San Francisco, CA 94104
Telephone: 391-7383
Attorney for Plaintiff

In the United States District Court
for the Northern District of California

No. C-70 538 RHS

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff,
vs.
American Foreign Steamship Company, et al.,
Defendants.

[Filed April 22, 1974]

PLAINTIFF'S MOTION TO ENTER JUDGMENT IN CONFORMITY WITH THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Plaintiff above named moves the Court as follows:

That it act upon the Mandate of the opinion of the United States Court of Appeals for the Ninth Circuit, issued April 9, 1974, reversing judgment for defendants, as attached hereto, and

That it enter final judgment for the plaintiff, as attached hereto.

The foregoing motion is based upon the Mandate of the United States Court of Appeals issued April 9, 1974, and on the Memorandum of Points and Authorities attached hereto.

Dated: April 22, 1974.

/s/ Eric J. Schmidt
Eric J. Schmidt
Counsel for Plaintiff

Memorandum of Points and Authorities

Tit 46, U.S.C. Sec. 596

Isbrandtsen v. Johnson, 72 S.Ct. 1011, 343 U.S. 779

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San Francisco, California 94104
Telephone: 986-2171
Attorneys for Defendant

In The United States District Court
For the Northern District of California

No. C-70 538 RHS

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff,
vs.
American Foreign Steamship Company, et al.,
Defendants.

[Filed May 14, 1974]

MEMORANDUM OF POINTS AND AUTHORITIES

Comes Now defendant American Foreign Steamship Company, a corporation, and submits the following Memorandum of Points and Authorities in opposition to plaintiff's motion to enter judgment in accordance with the Mandate issued from the United States Court of Appeals for the Ninth Circuit in the captioned matter.

Defendant contends that the United States Court of Appeals for the Ninth Circuit in its Opinion herein did not rule as a matter of law that the deduction in question was "without sufficient cause" within the meaning of 46

U.S.C. § 596. Moreover, and in any event, judgment should not be entered for plaintiff as prayed in the sum of Twenty-Nine Thousand Four Hundred and Sixty-Two Dollars ($29,462.00) representing penalty wages for the period March 24, 1969 to December 15, 1971 without this Court having fully considered all evidence and exercising its discretion in adjusting the duration of the penalty to the equities of this case.

A review of plaintiff's memoranda and supporting papers in its motion to obtain entry of judgment indicates that plaintiff interprets the opinion as amended by the United States Court of Appeals for the Ninth Circuit as holding as a matter of law that the defendant shipowner deducted or withheld the Five Hundred and Ten Dollars ($510.00) in question without sufficient cause within the meaning of 46 U.S.C. § 596. This Trial Court did not rule on the question of double wages since it concluded there was no unlawful withholding of earned wages. The question whether a refusal or neglect to pay earned wages is without sufficient cause presents a legal-factual question requiring a hearing on the merits. *McConville v. Florida Towing Corp.*, 321 F.2d 162 (5th Cir., 1963). Defendant respectfully submits that a close reading of the opinion of the Appellate Court shows that insofar as the question of double wages is concerned the Ninth Circuit merely held that the shipowner cannot claim that it had sufficient cause because of reliance on the General Maritime Law which does not require a shipowner to pay the cost of repatriating a seaman discharged in a foreign port for good cause, and that neither the wage voucher nor the release executed by the seaman can be claimed by the shipowner

as evidence tending to show that it had sufficient cause to withhold a portion of his wages.

As construed by the United States Supreme Court the words "refuses or neglects to make payment . . . without sufficient cause" connotes conduct which is in some sense arbitrary or willful and amounts to something more than merely valid defenses to a wage claim. *Collie v. Fergusson,* 281 U.S. 55, 74 L.Ed. 698 (1930). The phrase "without sufficient cause" in effect means a willful, unreasonable and arbitrary attitude upon the part of the Master or shipowner in refusing to pay earned wages to the seaman. Norris, The Law of Seaman (3rd ed.) § 385. The United States Supreme Court in *Collie,* Supra, went on to hold that liability for double wages is not incurred where the refusal to pay is in some reasonable degree morally justified. 281 U.S. p.56. In *McCrea v. United States,* 294 U.S. 23, 55 S.Ct. 291, 79 L.Ed. 735 (1936), the United States Supreme Court reiterated that a showing of arbitrary, willful or unreasonable conduct by the Master or shipowner was required before double wages would be imposed. Review of the opinion of the Appellate Court herein reveals an absence of any holding or finding that the Master or shipowner acted willfully, unreasonably or arbitrarily.

Thus, whether penalty wages should be imposed depends upon all the circumstances of the withholding. *Payne v. SS TROPIC BREEZE,* 274 F.Supp. 324 (D. Puerto Rico, 1967), reversed on other grounds, 291 F.2d 709. Accordingly, a refusal and neglect to pay wages within the meaning of § 596, when based in good faith upon questions of fact or the applicability of rules of law

which results in honest good faith litigation will be considered sufficient cause. *O'Hara v. Luckenbach SS Co.,* 16 F.2d 681 (9th Cir., 1926); *Korthinos v. The Niarchos,* 184 F.2d 716 (4th Cir., 1950), cert. den. 341 U.S. 905. See also *The Thomas Tracy,* 24 F.2d 372 (2d Cir., 1928), cert. den. 277 U.S. 595. Similarly, where a wage dispute and discharge of a seaman is placed before an American consul by a Master acting in good faith, and where the consul rules in favor of the Master, it has been held that refusal to pay seaman's wages at that time was not without sufficient cause. *Gold v. Matson Navigation Co.,* 73 F.2d 808 (9th Cir., 1934).

Defendant respectfully submits that a ruling on the question of sufficient cause requires consideration of not only the applicable law but all the circumstances surrounding the discharge and repatriation of this seaman, including the absence of any evidence of evil intent or arbitrary and unreasonable state of mind by the Master, the Master's good faith and reasonable belief that the purchase of the airline's ticket for the seaman's return transportation was not an illegal withholding of his earned wages but essentially amounted to a partial payment of his earned wages, the applicable currency regulations precluding payment to the seaman in U.S. dollars and the concurrence and approval of the U.S. Vice Consul and U.S. Coast Guard representatives. Defendant submits that these factors not touched upon by the Appellate Court in its discussion of the double wage penalty, considered in their entirety established that the deduction in question was not without sufficient cause.

Finally, plaintiff's request that the Court enter judgment for double wage penalties for the period March 24, 1969 through and including December 15, 1971 (the date the Trial Court entered judgment in favor of the defendant shipowner) fails to take into account the power of this Court to exercise its discretion in adjusting the duration of the penalty to the equities of the particular case. Norris, The Law of Seaman (3rd ed.), § 416; *Southern Cross SS Co. v. Firipis,* 285 F.2d 651 (4th Cir., 1960), cert. den. 365 U.S. 869; *Prindes v. The SS African Pilgrim,* 266 F.2d 125 (4th Cir., 1959); *Mavromatis v. United Greek Shipowners Corp.,* 179 F.2d 310 (1st Cir., 1949); *Pacific Mail SS Co. v. Schmidt,* 214 F. 513 (9th Cir., 1914), reversed on other grounds 241 U.S. 245.

As stated by the Fourth Circuit in *Mystic SS Co. v. Stromland,* in the opinion denying a rehearing: "it was certainly not the intention of Congress that the statute should be construed in such a way as virtually to deny to shipowners the right to contest liability in cases of this sort by making the penalty so great in case of failure to maintain the defense asserted as to deter them from making any defense at all." 21 F.2d 607 (4th Cir., 1927).

In addition to limiting the period of time during which the penalties run by virtue of the equities of the particular case, the Courts have similarly limited the period where diligence has not been shown by the seaman in instituting suit. *Caribbean Federation Lines v. Dahl,* 315 F.2d 370 (5th Cir., 1963), cert. den. 375 U.S. 831; *Kontos v. SS Sophie C.,* 236 F.Supp. 664 (D.C. Pa., 1964); *Forster v. Oro Navigation Co.,* 128 F.Supp. 113 (D.C.N.Y., 1954),

affirmed at 228 F.2d 319. In this connection, defendant respectfully points out that the date claimed by plaintiff upon which payment should have been made to the seaman is March 24, 1969 and the Complaint was not filed until March 13, 1970 or approximately one year later.

In addition to the circumstances surrounding the discharge and repatriation of this seaman and the good faith conduct of the Master, all of which should be considered by this Court in its consideration of limiting the penalty period to the equities, defendant submits that any neglect to pay wages was based in good faith upon issues of fact and applicability of rules of law resulting in litigation which at the trial level sustained the position of the shipowner. Under such circumstances it would be wholly unjust to rule that the shipowner's conduct was without sufficient cause.

Wherefore, defendant respectfully prays that plaintiff's motion to enter judgment in the amounts prayed be denied.

Dated: May, 14, 1974.

Graham & James
By John A. Flynn
Attorneys for Defendant

I hereby certify that on May 14, 1974 I mailed a true copy of the foregoing to the following:

Eric Schmidt, Esq.
528 Mills Tower
220 Bush Street
San Francisco, CA 94104

John A. Flynn

Eric J. Schmidt
528 Mills Tower
220 Bush Street
San Francisco, CA 94104
Telephone: 391-7383
Attorney for Plaintiff

In The United States District Court
For The Northern District Of California

No. C-70 538 RHS

Lillian M. Matise, as personal representative of Granville C. Matise, deceased, Plaintiff,

vs.

American Foreign Steamship Company, et al., Defendants.

[Filed May 20, 1974]

PLAINTIFF-APPELLANT'S REPLY MEMORANDUM

A part of the appellee's argument on this motion is devoted to a challenge of the Appellate Court's finding of liability. The response sought by appellee would require this Court to reverse the Court of Appeals on that issue. This part of the argument will not be discussed in this reply, for the reason that it is completely meritless. The Appellate Court found that the withholding was illegal and that the shipowner did not have sufficient cause for having made it. The question of sufficient cause was ruled

upon as a matter of law, based upon the facts which were placed before the Court by the record on appeal. The Court plainly stated its reasoning, both with respect to the grounds urged by the defendant and with respect to the general maritime law. The question of liability is settled.

Another portion of the appellee's argument is devoted to claiming a *reduction of the damages* awarded, based upon a concept which has been applied in certain other double-wage cases, and which has been labeled "tailoring."

There are three separate, compelling reasons why this theory is totally inapplicable to the present motion for judgment on mandate.

I. The defense is untimely;

II. The concept itself is illegal;

III. If it were timely and legal, the concept of tailoring is inapplicable to the present case.

Untimely

The trial below was not bifurcated. The damage issue was tried as well as the liability issue. All defenses concerning the amount of damages were required to be presented at the trial. The trial court's ruling that no liability existed followed the trial of all issues. No defense that had not been raised could be raised thereafter.

The argument to limit damages which is being made today was not made at the trial. It was not preserved for appeal. It was not presented to the Court of Appeals. It was not referred to in the Appellee's Petition for Rehearing. Its presentation on a motion for judgment on mandate is in total conflict with the entire concept of appellate

procedures. The appellant presented to the Court of Appeals the exact dollar amount which he claimed and that Court has found for him and his claim. No other amount was ever presented or contended for. The argument to limit the damages which is presented by the appellee for the first time on this motion is late by several years.

Illegal

In 1782 the Congress enacted the first penalty statute aimed at enforcing prompt payment of seamen's wages. It required a shipowner to pay *one* day's wage for each day of delay up to a limit of ten days' wages.

In 1872 (Shipping Commissioner's Act of June, 1872) the Congress increased the penalty by removing the time limitation, requiring the payment of one day's wage for each day of delay until the debt was paid or judgment entered.

In 1915 (LaFollette Act) the Congress again increased the penalty by requiring the payment of *two* days' wages for each day's delay until the debt was paid or judgment entered.

This law resulted in the accrual of heavy penalties, as it was obviously intended by Congress that it would, if the prohibited delay was allowed to occur.

> "After all, if sufficient cause for the deduction is found to be lacking, the shipowner or his agent has either been overtly culpable in reducing a seaman's wages, or significantly inattentive in his duties, viz-a-viz the seaman's wage rights. As we view it, it is precisely the possibility that large penalties will accrue that should motivate a shipowner to exercise care in computing wages due a seaman. We think that this deterrent was what Congress had in mind in providing for a penalty in the form of inflexible liquidated damages."
>
> *Swain v. Isthmian Lines, Inc.* 360 F.2d 81 (1966)

The unequivocal trend of the law over one and a half centuries has been toward increasing the penalty.

Subsequent to the latest amendment several courts devised a concept which permitted them to disregard the amount of the penalty as specifically provided by statute and apply equitable principles, as viewed by them, to reduce the total amount of the award to whatever amount satisfied their own feelings in the matter. Under this theory, if the seaman delayed in filing his action or did not pursue it diligently, the court "tailored" the award to lessen the penalty imposed on the shipowner for its breach of the law.

Under this concept, any court which chooses to do so can abrogate the 1915 amendment by Congress and determine the penalty in accordance with the law as it existed prior to that amendment. It can, if it chooses, abrogate both the 1915 amendment and the 1872 amendment and award the seaman only the amount he would have received under the original enactment of 1782. The amount is taken out of Congress' hands and determined by individual judges.

This power to abrogate and amend Congressional enactments to suit equitable concepts as viewed by individual courts clearly does not exist.

While some courts have adopted the "tailoring" concept, others have emphatically rejected it. Undoubtedly the most thoroughly reasoned decision on the question is that in

Swain v. Isthmian, supra, where the court reviews the entire history of the concept and declares,

> "In our view, those cases supporting the superimposition of equitable concepts on to Section 596 have, in fact, mitigated the statutory penalty in the name of the alleviation of supposed unnecessary harshness. We have concluded that these cases rest on no firm precedence, that such alleged harshness is illusory, that there is no compelling independent reason to lessen the statutory penalty case by case and, therefore the language of Section 596 must be read as a mandatory command to the judiciary."

Inapplicable

In the cases which allowed tailoring, the shipowner claimed equitable relief from detriment caused by the seaman's delay in declaring or prosecuting his claim, conduct which interfered with the earlier settlement of the claim and the stopping of the penalty. The appellee seeks to show such a basis in the present case by pointing to the time which elapsed between the date wages were due (March 24, 1969) and the date that suit was filed (March 13, 1970) "approximately one year later."

The seaman is not required to know the statutes involved in order to be protected by them. The shipowner's paymaster is required to know them and comply with them. Any delay occasioned by the seaman's learning of the rights which he was denied, and in this case deceived about, does not call for an equitable adjustment in favor of the transgressing party. The seaman in this case did not learn what his rights were for several months.

The seaman is not obliged to teach the controlling law to the shipowner. Yet the record in this case shows the following.

1. The seaman demanded his wages and penalty due on September 10, 1969, and at the same time informed the shipowner's Claims Department what the law was, citing the relevant statutes correctly. He also offered to settle for $1,910.00, which was the wages held and one-half the penalty owing to him at that time. (Exhibit A.)

2. The shipowner, fully and correctly apprised of the law, refused this offer. (Exhibit B.)

3. On September 30, 1969, the seaman supplemented the information concerning the law by citing the *Isbrandtsen* case, and repeated the same offer to compromise. (Exhibit C.)

4. On October 24, 1969, the seaman received notice from the shipowner's lawyers that they were taking the claim in hand. (Exhibit D.)

5. On November 21, 1969, the seaman sent a reminder to the lawyers. (Exhibit E.)

6. On January 22, 1970, having had no acknowledgment from the shipowner's lawyers, the seaman wrote again to them and cited additional cases (including *Schwark)* and stated a new offer to compromise for $2,500.00. This letter gave thirty days for acceptance, to February 22, 1970. (Exhibit F.)

7. No answer was received and on March 13, 1970, the suit was filed, concluding six months of demands, teaching of law, and offers to compromise.

8. On January 5, 1971, the seaman brought a motion for summary judgment, again citing the law on which this case was decided by the Ninth Circuit. In this motion he pointed out:

"A motion for summary judgment is especially appropriate in the present case . . . (because) the penalty provided in Section 596 for unjustified withholding of wages is *cumulative* (citing *Isbrandtsen).* Therefore, early adjudication of any penalty dispute tends to prevent an extreme result."

The shipowner's reply was to file a counter-motion for summary judgment.

Finally, the shipowner was advised by its own counsel to settle this case for $3,500.00. It refused to accept this advice and ordered the case to be defended.

If the foregoing facts, involving teaching, diligence, and compromise by the seaman—and rejection of its own lawyers' advice by the shipowner—do not call for the full statutory award, even under the equitable doctrine of "tailoring," one can only wonder what more could be required for a seaman to receive this benefit.

Dated: May 20, 1974.

/s/ Eric J. Schmidt
Eric J. Schmidt
Counsel for Plaintiff

Exhibit A

September 10, 1969

American Foreign Steamship Corp'n.
80 Broad Street, New York, n.y. 10004

Re: Granville C. Matise—Withholding of wages
S.S. American Hawk : 3/19/69

Gentlemen:

The above-named American seaman was discharged from his employment on the American vessel "S.S. American Hawk" at the port of Saigon, S. Vietnam, on March 19, 1969.

Under the governing federal statutes he became entitled to the immediate payment of his earned wages at that time, with no right in the shipowner to delay. (46 U.S.C. sects. 682 et seq.)

Mr. Matise was not paid his wages until March 24, 1969, and at that time earned wages—not in dispute—in the amount of $510.00 were unlawfully withheld, purportedly to repay the shipowner its costs of repatriating said to the United States.

The law with respect to the withholding of seaman's wages has long been settled and clear. The Supreme Court of the United States has repeatly declared that the withholding of a seaman's wages can be permitted only in strict compliance with the relevant statutes (46 U.S.C. sects. 701 et seq.) and that even where a seaman admittedly owes money to the shipowner, payment cannot be enforced by withholding wages but must be effected in a

separate action. The justification for withholding wages is limited strictly to the grounds set forth in the statutes. The fact that the withholding in this case was declared to be for the purpose of paying an indebtedness belonging to the shipowner, merely makes the offense more serious.

Mr. Matise has employed this office to recover his wages and the penalty provided under Section 596 for wrongful withholding. We have agreed to do so, and accordingly demand said wages in the sum of $510.00 and the double-wage penalty under Section 596 for the 175 days which have elapsed since the wages became due. This amounts to $2,800.00.

We offer, in a spirit of compromise, to release all claims in return for the payment of one-half the penalty and the restoration of the wages involved—a sum of $1,910.00.

We request your early response.

Exhibit B

AMERICAN FOREIGN STEAMSHIP CORPORATION
Oversea Bulk Cargo Carriers
Steamship Owners and Operators
80 Broad Street
New York, N.Y. 10004

CABLE ADDRESS
AMSTEAM

TELEPHONE
DIGBY 4-7432

September 26, 1969

Eric J. Schmidt
Attorney at Law
556 Mills Tower
San Francisco, Calif. 94104

Re: Granville C. Matise
Ex-Oiler S.S. American Hawk

Dear Mr. Schmidt:

In response to your letter dated September 10, 1969 concerning the above referenced seaman, I am submitting copies of Official Loggings concerning said Oiler. Mr. Matise was logged on five separate occasions during his period of employment on the S.S. American Hawk.

The Master of the Vessel presented these facts to the U.S. Coast Guard at Saigon, upon the Ships arrival at that Port, whereby the Coast Guard ordered Mr. Matise removal from the Vessel. Special permission was granted the Master to break seal on the Ships safe, in order to purchase an Air Line Ticket, which had to be paid in dollars. No other monies were authorized to be withdrawn from the safe, since according to currency regulations at Saigon, it is against the law to bring U.S. currency ashore.

Mr. Matise was paid the balance of any earned wages due, upon his arrival back in the United States, by our Agents, J. H. Winchester & Co., Inc. in San Francisco, Calif., upon presenting himself at their office. The deduction of $510.00 to cover the cost of transporting Mr. Matise, was done with the full knowledge of Mr. Matise, as well as the U.S. Coast Guard and U.S. Consul at Saigon.

In view of the facts stated in this letter, we do not feel that Mr. Matise has any basis for a Monetary Claim against this Company.

Very truly yours,
AMERICAN FOREIGN STEAMSHIP CORPORATION
/s/ W. J. Geiger,
Paymaster

Exhibit C

September 30, 1969

American Foreign Steamship Corp'n.
80 Broad Street, New York, N.Y. 10004
Att: W. J. Geiger, Paymaster

Re: Granville C. Matise
S.S. American Hawk

Dear Mr. Geiger:

Your courteous and documented reply to the demand in this case has been received.

The fact is that Mr. Matise does not challenge the loggings or his discharge in Saigon. But the company's claim that a seaman discharged for cause in a foreign port can be forced to pay for his transportation home by a wage-withholding is the error we are dealing with. *It is settled law that the repatriation costs of a seaman, however separated from his vessel, cannot legally be deducted from his wages.* Even where the shipowner's right to reimbursement is undisputed he cannot withhold wages.

> ". . . only such deductions and setoffs for derelictions in the performance of his duties shall be allowed against his wages as recognized in the statutes. Other claims against him may be valid but their collection must be sought by other means."
>
> *Isbrandtsen Co. v. Johnson,* 72 S.Ct. 1011, 1017

The shipowner is held to a knowledge of the governing law in this respect. "Full knowledge" of the U.S. Coast Guard and Consul have no bearing.

We stand by the offer to compromise stated earlier.

ES/jfl

Exhibit D

(Letterhead of
Dougherty, Ryan, Mahoney, Pellegrino & Giuffra
Counsellors at Law
67 Wall Street
New York, N.Y. 10005)
October 24th, 1969

Eric J. Schmidt, Esq.
556 Mills Tower
San Francisco, California 94104

Re: SS "American Hawk"
Granville C. Matise
Our File No. 4133

Dear Mr. Schmidt:

The above matter has been referred to us by American Foreign Steamship Corporation. We are reviewing the file and will contact you to discuss the matter at the earliest opportunity.

Very truly yours,
Dougherty, Ryan, Mahoney, Pellegrino & Giuffra
By: L. Mahoney

LJM:mh
Airmail

Exhibit E

November 21, 1969

Dougherty, Ryan, Mahoney et al.
67 Wall Street
New York, N.Y. 10005

Attention: Mr. Lawrence Mahoney

Re: S.S. "American Hawk"
Granville C. Matise
Your file no. 4133

Dear Mr. Mahoney:

We are awaiting your response concerning the claim presented by the seaman named above.

Very truly yours,
Counsel for Claimant

ES/jfl

Exhibit F

January 22, 1970

Doughtery, Ryan, Mahoney, et al.
67 Wall Street
New York, N.Y. 10005

Attention: Mr. Lawrence Mahoney

Re: S.S. "American Hawk"
Granville C. Matise
Your file: no. 4133

Dear Mr. Mahoney:

Our offer to compromise this claim for the payment of $1,910.00 is hereby withdrawn. The double-wage penalty has been running steadily since your last sign of interest on October 24, 1969. If your firm handles seamen's cases, it must surely know that no wage forfeitures or withholdings are permissible for the purpose of reimbursing the shipowner for any contractual obligation owed by the seaman, even after that obligation has been reduced to judgment. In the present case, the basic right of the shipowner to be reimbursed is almost certainly non-existent, but that is not the point. Taking a seaman's wages for the purpose is illegal regardless of the validity of the obligation. I cite you to *Kontos,* 236 FS 664; *Swain,* 360 F2d 81; *Isbrandtsen v. Johnson,* 72 S.Ct. 1011, 343 U.S. 779; and for a case directly on point with Matise, *Schwark v. S.S. Rio Macareo,* 249 FS 375.

I spoke with my client this morning. We offer to settle this claim for the amount of $2,500.00. This offer will terminate in thirty days and suit will be filed.

Very truly yours,

PROOF OF SERVICE BY MAIL (C.C.P. 1013a, 015.5)

State of California

City and County of San Francisco
ss.

I am a citizen of the United States and a resident of the county of San Francisco.

I am over the age of eighteen years and not a party to the within above entitled action; my business address is: 528 Mills Tower, 220 Bush Street, San Francisco, CA 94104.

On May 20, 1974 I served the within Plaintiff-Appellant's Reply Memorandum.

On the opposing counsel in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at addressed as follows:

Graham & James
Attorneys at Law
310 Sansome Street
San Francisco, CA 94104

I, Betty M. Lundwall, certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

Executed on May 20, 1974 at San Francisco, California.

/s/ Betty M. Lundwall
Betty M. Lundwall

*Proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

In The United States District Court
For the Northern District of California

No. C-70 538 RHS

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff,

vs.

American Foreign Steamship Company, et al.,
Defendants.

[Filed June 13, 1974]

JUDGMENT ON MANDATE

Lillian M. Matise, as personal representative of Granville C. Matise, deceased, having appealed to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this cause on the 15th day of December, 1971, and said Court having issued its Mandate dated the 9th day of April, 1974, wherein it was ordered, adjudged and decreed that such judgment be reversed, with costs assessed at $94.65 in favor of appellant;

Now upon the Mandate of the United States Court of Appeals for the Ninth Circuit, dated the 9th day of April, 1974,

It is Ordered, Adjudged and Decreed that the judgment of this Court entered December 15, 1971, be, and the same is hereby vacated and set aside; that the cause

be restored to the docket for further proceedings in accordance with such Mandate; and that, pursuant to said Mandate, judgment be entered that Lillian M. Matise, as personal representative of Granville C. Matise, deceased, have and recover from American Foreign Steamship Corporation the following sums:

1. $510.00 as wages wrongfully withheld, with interest thereon at seven percent (7%) from March 24, 1969 to December 15, 1971, amounting to $95.62, for a total sum of $605.62;

2. $29,462.00 as penalty wages for the wrongful withholding of earned wages from March 24, 1969 to December 15, 1971, with interest thereon at seven percent (7%) from December 15, 1971, to June 7, 1974, amounting to $5,106.00;

3. $94.65 as costs on appeal;

4. $37.00 as costs in this Court.

Dated: June 13, 1974.

Robert H. Schnacke
Judge of the United States District Court

United States Court of Appeals
For the Ninth Circuit

No. 74-2721

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff-Appellee,
vs.
American Foreign Steamship Company, et al.,
Defendant-Appellant.

[Filed Sept. 27, 1974]

ORDER

Before: DUNIWAY and ELY, Circuit Judges

The appellee has presented herein two motions, (1) to expedite the appeal, (2) to require the appellant to post an adequate supersedeas bond. The only issue presented by the appeal is apparently whether the District Court complied with this court's judgment in *Matise v. American Foreign Steamship Co.*, ... F.2d ..... (9th Cir. Mar. 8, 1974). The court is familiar with the record and has examined the District Court's judgment of June 13, 1974, the judgment challenged in the present appeal.

That judgment, in the court's opinion, conforms with the intention of this court, as expressed in its opinion of March 8, 1974. The subject appeal is therefore dismissed as frivolous.

Graham & James
One Maritime Plaza
San Francisco, California 94119
Telephone: 986-2171
Attorneys for Appellant
and Petitioner

In the
United States Court of Appeals
for the Ninth Circuit

No. 74-2721

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Plaintiff-Appellee,
vs.
American Foreign Steamship Company, et al.,
Defendant-Appellant.

[Filed Oct. 11, 1974]

PETITION FOR A REHEARING IN BANC

Appeal from the United States District Court for the Northern District of California

Honorable Robert H. Schnacke, Trial Judge

Comes Now American Foreign Steamship Company, appellant-petitioner herein, and respectfully petitions this Court for a rehearing in banc of its order of dismissal filed September 27, 1974. As this Court is aware, the

above-entitled case is but one of many so-called double-wage penalty cases instituted by attorney Eric J. Schmidt in the United States District Court for the Northern District of California and brought before this Court on appeal. Although the other cases may be considered typical wage cases, the above-entitled matter is atypical in that this seaman received all funds to which he was entitled. This is not disputed and is the law of the case. Since all the double-wage cases, including this matter, have been submitted to panels of different judges, it is respectfully suggested that an in banc rehearing be held.

Wherefore, appellant respectfully requests that this Court order a rehearing in banc.

Respectfully submitted,
Graham & James
By /s/ John A. Flynn
John A. Flynn
Attorneys for Appellant-Petitioner

CERTIFICATE OF SERVICE

I, JOHN A. FLYNN, hereby certify that on the 11th day of October, 1974 I mailed two (2) true copies of the Appellant's Petition for a Rehearing in Banc to Eric J. Schmidt, Attorney for Appellee, 528 Mills Tower, 220 Bush Street, San Francisco, California.

/s/ John A. Flynn
John A. Flynn

United States Court of Appeals
for the Ninth Circuit

No. 74-2721

Lillian M. Matise, as personal representative of Granville C. Matise, deceased,
Appellee,
vs.
American Foreign Steamship Company, et al.,
Appellant.

[Filed Nov. 7, 1974]

ORDER

Before: DUNIWAY and ELY, Circuit Judges.

The motions panel concerned with the subject case (Duniway and Ely) has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.